88-1989

FILED
JUN 28
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME LOCAL 152, AFL-CIO,
et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

AFFIDAVIT OF FILING AND SERVICE BY MAIL

CHARLES K.Y. KHIM
888 Mililani Street,
Suite 301
Honolulu, HI 96813
PH: (808) 537-5305

Attorney for
Respondents Hawaii
Government Employees
Association, AFSCME
Local 152, AFL-CIO,
et al.

QUESTIONS PRESENTED FOR REVIEW

Whether the Ninth Circuit erred in giving collateral estoppel effect, pursuant to the Full Faith and Credit statute, 28 U.S.C., Section 1738, to a final state court judgment affirming an arbitration award.

Whether the Supreme Court should issue a writ of certiorari ordering that the foregoing issue be considered by that Court.

TABLE OF CONTENTS

		Page
	STATEMENT OF THE CASE	1
	SUMMARY OF ARGUMENT	7
	ARGUMENT	8
I.	The Scope of Minimal Due Process Has Been Adequately Defined By this Court Numerous Times.	8
II.	This Court Has Already Decided that the Extent of the "Full and Fair" Requirement.	11
III.	No Conflict Exists Between the Circuits Over the Issues Herein.	13
IV.	Petitioner's "Put Right" Arguments for Certiorari Argue that Petitioner Is Entitled to an Appeal as of Right to the Supreme Court.	17
V.	Petitioner Has Breached Supreme Court Rule 21.5., Warranting Denial of His Petition.	18
	CONCLUSION	19
	FOOTNOTES	21
	AFFIDAVIT OF SERVICE	22

TABLE OF AUTHORITIES

	Page
Cases	
Allen v. McCurry, 449 U.S. 90 (1980)	16, 21
Caldeira v. County of Kauai, et al., 866 F.2d 1175 (9th Cir. 1989)	15
Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986)	15
Goss v. Lopez, 419 U.S. 565, 578 (1975)	11
Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982)	7, 10, 12
Marine Trans. Corp. v. Dreyfus, 284 U.S. 263, 275-276 (1932)	21
Re Lau Ow Bew, 141 U.S. 583, 589 (1891)	8
Shearson Am. Ex. Inc. v. McMahon 482 U.S. 220 (1987)	21
Constitutional Provisions and Statutes	
9 U.S.C.	
Section 1	21

28 U.S.C.

Section 1738 — 7, 10, 12

42 U.S.C.

Section 1983 — 3, 8, 10, 12, 13, 15, 16

Section 1985(3) — 3, 6, 15

Hawaii Revised Statutes

Chapter 658 — 4

Other Authorities

Supreme Court Rules

Rule 17.1 — 8
Rule 21.5. — 18, 19

TREATISES

ELKOURI "How Arbitration Works" — 21

(BNA 1973)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME LOCAL 152, AFL-CIO,
et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The recitation of facts contained in the Ninth Circuit's decision herein is accurate, and is not being explicitly challenged by Petitioner. In summary, these facts are as follows:

Petitioner was employed by Respondent County of Kauai (hereinafter,

Kauai) as a pool attendant. Soon after Petitioner began working for Respondent Kauai he failed to perform his work in a proper manner, and was disciplined for it. Respondent Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO and the Respondents affiliated with the same (hereinafter collectively referred to as HGEA, et al.) were the collective bargaining representatives of Petitioner. Respondents HGEA, et al., were initially successful in having the sanctions imposed with said discipline ameliorated or eliminated.

Petitioner continued to fail to perform his job properly, and eventually was discharged from his job, despite the efforts of Respondents HGEA, et al., to prevent his discharge.

The collective bargaining agreement between Respondents HGEA, et al., and Respondent Kauai provided that, among

others, Petitioner could not be discharged from his job absent proper cause. Respondents HGEA, et al., alleged that Petitioner was discharged in violation of said clause, and a two-day arbitration hearing was conducted over said allegation. Arbitrator Stanley Ling, a graduate of University of Michigan Law School who is licensed to practice law in Hawaii, ruled that said clause was not breached because Petitioner was discharged for proper cause.

Thereafter, Petitioner brought suit in District Court alleging that Respondent Kauai and Respondents affiliated with Respondent Kauai conspired to cause his discharge in violation of 42 U.S.C., Section 1983 (hereinafter, Sec. 1983) and that Respondents HGEA, et al., allegedly joined this conspiracy in violation of 42

U.S.C., Section 1985(3) (hereinafter, Sec. 1985(3)).

Pursuant to a motion by Respondent Kauai, the arbitration award was confirmed under Hawaii Revised Statutes, Chapter 658, which provides that confirmed arbitration awards shall have the force and effect of a judicial judgment. This judgment became final when Petitioner's appeal thereof to the highest Hawaii Court was dismissed.

The District Court gave the foregoing judgment collateral estoppel (issue preclusion) effect and granted summary judgment in favor of all Respondents. The District Court also granted summary judgment to Respondents HGEA, et al., on the ground that there was no material issue of fact that they did not conspire to oust Petitioner from his job.

The Ninth Circuit affirmed the

District Court's summary judgment.

While the chronological order of the sequence of events in Petitioner Ronald Caldeira's statement of the case is generally correct, there are several inaccuracies and omissions in the actual setting forth of said events that need to be corrected.

Although Petitioner alleged in his complaint that there was a grand conspiracy formed soon after he was hired to ouster him from his job, the District Court found as a matter of undisputed fact, and the Ninth Circuit affirmed, that the Respondents proved that there was no conspiracy between Respondent Kauai and Respondents HGEA, et al., to deprive Petitioner of his job. The lower courts further found as a matter of fact, that Petitioner failed to introduce evidence sufficient to rebut this establishment of the fact that no

such conspiracy existed. The lower courts made this finding of fact in conjunction with their holding that summary judgment against Petitioner's Sec. 1985(3) claim appropriate.

Regarding the motion to confirm arbitrator's award, only Respondent Kauai made such a motion in State Court. This is contrary to Petitioner's statement that both Respondent Kauai and Respondent HGEA, et al., so moved. Contrary to Petitioner's statement that said motion was too late, the State Court found the aforesaid motion to confirm to be timely.

Prior to the granting, in open court, of Respondent Kauai's motion to confirm, the only challenge that Petitioner made thereto was that said motion was untimely; no opposition to the merits of said motion was made by Petitioner, until after the granting of said motion.

SUMMARY OF ARGUMENT

Certiorari should not be granted herein because Petitioner in his petition for certiorari has failed to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration of said petition.

Also, certiorari should not be granted herein because no important question of Federal law which has not been, but should be, settled by this Court exists herein, since the scope of minimal procedural due process has been well defined by this Court, and since the definition of what constitutes a "full and fair" hearing in the context of applying collateral estoppel in a 28 U.S.C., Sec. 1738 (hereinafter, Sec. 1738) context has been defined by this Court in Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982).

Finally, certiorari should not be granted herein because the Ninth Circuit's decision herein is not in conflict with the decisions of other Circuit Courts, even assuming, arguendo, that other Circuit Courts hold that Sec. 1983 claims are "different" than State Court claims, since the Ninth Circuit applied collateral estoppel (issue preclusion) herein, and not res judicata (claim preclusion).

ARGUMENT

I. The Scope of Minimal Due Process Has Been Adequately Defined By This Court Numerous Times.

It is a long established principle of this Court, established in many cases, that writs of certiorari should be granted sparingly, e.g., Re Lau Ow Bew, 141 U.S. 583, 589 (1891). Indeed, this principle is reiterated in Supreme Court Rules (hereinafter, S.Ct.R.), Rule 17.1.

which provides that a writ of certiorari is not a matter of right, and will be issued "only when there are special and important reasons therefor."

The thrust of Petitioner's arguments are merely that the lower courts erred in the application of routine and well established principles of law to the facts in this case. Thus, it appears that Petitioner's arguments amount to no more than an appeal for certiorari as a matter of right. The only place Petitioner specifically stated in his brief the grounds for which certiorari should be granted are on pages 47 and 48 thereof. An examination of these grounds indicates that Petitioner is merely asking this Court to issue a writ of certiorari to review the Ninth Circuit's application of routine, well established doctrines to the facts of the instant matter. For example, on page 47 of his

brief, Petitioner argued that this Court should grant certiorari because in Sec. 1983 cases where Sec. 1738 is sought to be applied, the scope of minimal due process is undefined. To the contrary, as demonstrated infra, the scope of minimum due process has been well defined.

In Kremer this Court held that in Sec. 1983 cases where Sec. 1738 is sought to be applied, there will be no such application where the party against whom Sec. 1738 is to be applied did not receive a full and fair opportunity to litigate, in the state proceeding. This Court further held in Kremer that:

> "But for present purposes, where we are bound by the statutory directive of Sec. 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." id.

The minimum procedural requirements of the Fourteenth Amendment's Due Process Clause have been enunciated by this Court on numerous occasions to consist of notice, and an opportunity for a hearing, e.g., Goss v. Lopez, 419 U.S. 565, 578 (1975). Thus, certiorari need not be granted herein in order to determine what the minimum due process requirements consists of.

It appears that Petitioner is really asking that this Court reverse the lower court's application of the foregoing due process criteria of notice and a hearing, to the facts herein. This is really asking for an appeal as of right. [1] Therefore, the instant petition should be denied.

II. This Court Has Already Decided the Extent of the "Full and Fair" Requirement.

On page 47 of his brief, Petitioner argued that this Court can determine the

supposedly undecided issue of whether "the question of 'full and fair' is one of fact which must be litigated before a Sec. 1983 claim can be precluded."

As demonstrated above, this Court in Kremer already determined that for the purposes of determining whether to preclude claims or issues in Sec. 1983 cases by applying the statutory mandate of Sec. 1738, such preclusion cannot occur when a "full and fair" state proceeding did not occur. This Court further stated that for this purpose, a state proceeding shall be determined to be "full and fair" if the minimum constitutional due process requirements of the Fourteenth Amendment are met. Thus, Petitioner's foregoing supposed unanswered issue has already been answered by this Court when it held in Kremer that the question of "full and fair" as a matter of law has been

determined to equal the question of whether minimum due process has been afforded. Therefore, certiorari need not be granted on the foregoing ground proffered by Petitioner.

III. No Conflict Exists Between the Circuits Over the Issues Herein.

On page 47 of his brief, Petitioner argues that there is a difference in opinion between the Ninth Circuit and other Circuits as to whether Sec. 1983 claims are "different" than state law claims and therefore not precluded under the doctrine of res judicata (claim preclusion). This argument is faulty because in the present case the Hawaii Court's final judgment was given collateral estoppel (issue preclusion) effect and not res judicata (claim preclusion) effect. 2/

In the present case, essential elements of Petitioner's Sec. 1983

substantive due process claim were the allegations: that Petitioner had a proprietary interest in his job via the covenant contained in Respondent HGEA, et.al's, collective bargaining agreement which provided that, among others, Petitioner could not be discharged from employment except for proper cause; [3] and that this covenant was breached.

The Hawaii Courts confirmed the arbitration award which held that the aforesaid clause in the collective bargaining agreement was not breached because Petitioner was discharged from employment with Respondent Kauai with proper cause. The District Court collaterally estopped Petitioner from relitigating in Federal Court the issue of whether the foregoing "proper cause" covenant was breached. The District Court also found that the allegation of breach of the foregoing covenant was the

"lynch pin" of Petitioner's Sec. 1983 claim and parts of the Sec. 1985(3) claim. This being the case, the District Court granted summary in favor of Respondents relying upon this Court's holding in Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986) that summary judgment is proper when it is established that an "essential element" of a party's claim does not exist, "since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

The Ninth Circuit affirmed the District Court's foregoing application of collateral estoppel, 866 F.2d, at 1178-1179.

The foregoing indicates that assuming, arguendo, that there is a conflict between the Circuit Courts as to the application of res judicata, (claim

preclusion), this petition is not the proper case in which to resolve this conflict because res judicata (claim preclusion) was not involved in this case. Rather, only collateral estoppel (issue preclusion), was involved herein. Moreover, this Court in Allen held that collateral estoppel was applicable to a subsequent case that constituted a different claim all together. Therefore, it is of no consequence that the Hawaii Court judgment concerned a different claim than the Sec. 1983 claim.

Thus, Petitioner's arguments that there is a conflict in the Circuit Courts as to whether Sec. 1983 claims are subject to claim preclusion where there was no jurisdiction in the state proceeding to adjudicate a Sec. 1983 claim, etc., are irrelevant to the present case since collateral estoppel not res judicata is involved herein.

For the reasons stated above, certiorari should not be granted on this ground.

IV. Petitioner's "Put Right" Arguments For Certiorari Argue that Petitioner Is Entitled to an Appeal as of Right to the Supreme Court.

Petitioner on pages 47-48 of his brief argues that certiorari should be granted in order to "put right" the various alleged errors in the Ninth Circuit's decision herein. These "put right" arguments are, in substance, arguments that a writ of certiorari should be issued in order to afford Petitioner a routine right to appeal the decision of the Ninth Circuit rendered herein.

As established supra, this Court has stated both in its decisions and in its rules that writs of certiorari shall be sparingly issued only when there are special and important reasons therefor,

and will not be issued routinely as a matter of right. In view of this doctrine, Petitioner's "put right" arguments should be ignored by this Court since these "put right" arguments merely demand that this Court issue a writ of certiorari routinely as a matter of the Petitioner's right to appeal any decision of the Ninth Circuit, and no such right exists.

V. Petitioner Has Breached Supreme Court Rule 21.5., Warranting Denial of His Petition.

Supreme Court Rules (hereinafter, S.Ct.R.), Rule 21.5. states, in pertinent part, that:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

The present petition is not limited

to the alleged issues of first impression and the alleged conflict between the Circuits, which are the only legitimate points that should be raised in this petition. Rather, the present petition is a sixty-four page saga of the entire litigation herein, and asks this Court to overrule every perceived error made by the lower courts, important or not. Thus, Petitioner has failed to present with brevity, accuracy and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration herein.

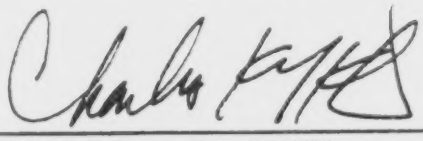
By reason of the foregoing, the present petition should be denied for breach of S.Ct.R., Rule 21.5.

CONCLUSION

For the foregoing reasons, Respondents HGEA, et al., submit that the

present petition for certiorari should be denied.

DATED: June 28, 1989.



CHARLES K.Y. KHIM
Attorney for Respondents
Hawaii Government Employees
Association, AFSCME Local
152, AFL-CIO, et al.

FOOTNOTES

1/ Assuming, *arguendo*, that there was a legitimate novel question as to the constitutionality of the arbitration award confirmation procedure in the Hawaii Arbitration Act, Haw. Rev. Stat., Chapter 658 (hereinafter, Chapt. 658), there is no doubt that Chapt. 658 would withstand constitutional scrutiny inasmuch as Chapt. 658 adopted, virtually *verbatim*, the terms of the Federal Arbitration Act, 9 U.S.C., Section 1, et seq., and this Court has upheld judicial confirmation of arbitration awards under said Act's provisions, *see*, *Marine Trans. Corp. v. Dreyfus*, 284 U.S. 263, 275-276 (1932). Also, this Court has recently enforced said Act's provisions to compel the arbitration of claims that are actionable under Federal Statutes, *see*, *Shearson Am. Ex. Inc. v. McMahon*, 482 U.S. 220 (1987).

2/ *Res judicata* and collateral estoppel are often confused for each other. *Res judicata* precludes relitigation of any claim that was raised or could have been raised; Collateral estoppel only precludes relitigation of any issue of fact or law, *see*, *Allen v. McCurry*, 449 U.S. 90 (1980).

3/ While many collective bargaining agreements incorporate the "just cause" standard for discharge, the Respondent HGEA, et al., agreement utilizes the proper cause standard. The foregoing standards are equivalent, *see*, Elkouri, "How Arbitration Works" p. 612 (BNA 1973), and cases cited therein.

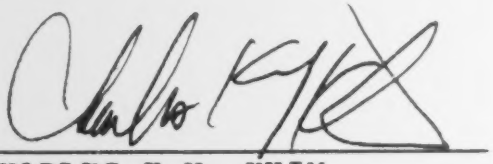
AFFIDAVIT OF FILING AND SERVICE BY MAIL

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

I, Charles K.Y. Khim, being first duly sworn, depose on oath and state that I am a member of the Bar of the Supreme Court of the United States; and that on the 28th day of June, 1989, a date within the time permitted, I mailed the original document attached hereto to the Clerk of the U.S. Supreme Court for filing, first class postage prepaid, and I served copies of the Brief in Opposition to Petition for Certiorari on the following persons at the following addresses by causing copies to be mailed in duly addressed envelopes, with first class postage prepaid as follows:

L. RICHARD FRIED
Attorney at Law
Davies Pacific Center
Suite 1900
841 Bishop Street
Honolulu, HI 96813
Attorney for
Ronald Caldeira

WARREN C.R. PERRY
Second Deputy
Attorney
County of Kauai
444 Rice Street
Suite 230
Lihue, HI 96766
Attorney for
County of Kauai



CHARLES K.Y. KHIM,
888 Mililani Street,
Suite 301
Honolulu, HI 96813
PH: (808) 537-5305

Attorney for Respondents
Hawaii Government
Employees Association,
AFSCME Local 152, AFL-CIO,
et al.

F.S.

Subscribed and sworn to before me this
28th day of June, 1989.

Rena L. MacDonald

NOTARY PUBLIC, STATE OF HAWAII
My Commission Expires: 4-20-92